CWTI

Chemical Waste
Transportation
Institute

August 11, 1993

QA
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FHWA Docket
Room 4232, HCC-10
Office of the Chief Counsel
Federal Highway Administration
US Department of Transportation
400 Seventh St., SW
Washington, DC 20590

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LEGAL/REGS. DIV.

FHWA-97-2180-39

RE: MC-92-4

Dear Sir or Madam,

On behalf of the Chemical Waste Transportation Institute (CWTI), I am submitting comments concerning FHWA's proposal to implement Section 8 of the Hazardous Yateriais Transportation Uniform Safety Act (HMTUSA).

The CWTI is part of the National Solid Wastes Management Association, a not-for-profit association that represents waste services companies throughout the United States and Canada. Members of the Institute are commercial firms specializing in the transportation of hazardous waste, by truck and rail, from its point of generation to its management destination. Our members transport over 50 percent of all commercially managed hazardous waste.

Hazardous wastes are regulated in transportation as hazardous materials. Hazardous wastes can be found in every hazard class including Class 1, Class 2, Class 6 and Class 7. As such, members of the Institute are directly affected by the outcome of this rulemaking.

There are many features of the proposed federal motor carrier hazardous materials safety permit which are commendable. Nevertheless, the Institute has some concerns that merit further consideration prior to the promulgation of a final rule on this matter.

Federal Preemption: Clarification About The Relationship Between Section 8 and Section 22

As a segment of the hazardous materials transportation industry which has been the subject of conflicting, divergent, and non-reciprocal non-federal permit schemes, we welcome the statement in the preamble that the federal safety permit would preempt any

58 FR 33418 (June 17, 1993).

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NSWMA

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state permit requirement dealing with transportation of the same hazardous materials if compliance with both permits was not possible or if the state permit creates an obstacle to the accomplishment of the Hazardous Materials Transportation Act (HMTA) and the hazardous materials regulations (HMRs). Nevertheless, this statement raises the following issues:

- First, this provision should be included within the text of the regulation, not just the preamble.

- Second, the statement should be amended to make clear that non-federal, rather than just state, permit requirements would be subject to scrutiny under the preemption provisions of the HMTA.

- Third, this provision holds out an opportunity for significant administrative relief from all non-federal permit requirements. Our industry, for one, looks forward to the time that the federal safety permit is applicable to all hazardous materials, not just "designated high risk hazardous materials" (DHRHM) A motor carrier seeking to transport hazardous waste in the thirty states that currently impose permit fees would have to pay in excess to $10,000 to operate one truck. This cost does not take into account the administrative expenses of tracking and keeping current with the various state filing requirements. Many in industry would be willing to pay for the privilege to be subject to the federal safety permit that would effectively preempt non-federal permit requirements. If the federal safety permit conditions are adequate for DHRHMs, they should be more than adequate to ensure the "fitness, willingness, and ability" of motor carriers of other hazardous materials. FHWA should consider the feasibility of bringing all motor carriers of hazardous materials -- or at least those carriers operating in interstate commerce that are also subject to the federal hazardous materials registration requirements[2] -- either immediately, or no later than the proposed three-year transition period for Class 1 carriers, into the federal safety permit structure.

- Fourth, as we read the preemption statement in the preamble, the federal safety permit would only grant carriers relief from non-federal requirements when the carrier was in the act of transporting DHRHMs. If a motor carrier with a federal safety permit transported a non-DHRHM material, however, there would be no relief from non-federal permit conditions. We find such an outcome administratively unacceptable. At a minimum, the preemption language should be clarified so that a motor carrier holding a valid federal safety permit would be exempt from all non-federal permit requirements.

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[2] 49 CFR 107.601.

- Fifth, the rule should explain the relationship between the federal safety permit and the, yet to be finalized, state-issued hazardous materials motor carrier permit being developed pursuant to Section 22 of HMTUSA. Clearly, Section 22 authorizes states to impose permit requirements on motor carriers of hazardous materials, including DHRHMs, as long as the permit requirements are uniform and reciprocal with the requirements of other states. Inasmuch as the Section 22 state permit will ultimately be authorized by federal regulation, we do not believe that the Section 22 permit could be preempted under the "dual compliance" or "obstacle" set forth at 49 CFR 107.202(b).

One-Stop Operations

For all its effort to eliminate paperwork burdens, the FHWA proposal creates a situation where a motor carrier will "register" with RSPA and obtain a "permit" from FHWA. When the Working Group on State Motor Carrier Procedures staffed by the National Governors Association was devising ways to relieve carriers of unnecessary administrative duties, the Working Group recommended that states institute "one-stop operations" where a motor carrier should dispense with all the permit, registration, licensing, etc., requirements of a state at one location, or one point of contact. The FHWA should consider how the federal safety permit can be meshed with RSPA's registration filing so that both tasks can be accomplished at the same time.

Adequacy Of Form MCS-150

The current MCS-150 form needs to be revised to reflect in item 14 the United Nations (U.N.) hazard classifications -- Class 1 through Class 9 -- which are mandatory as of October 1, 1993. This rulemaking provides FHWA the opportunity to make these revisions consistent with the U.N. standards as well as others, as follow, which will make form MCS-150 more suitable for the purposes of the federal safety permit:

- First, we believe that there should be space for a motor carrier to indicate the carrier's current safety rating, if the carrier has one, and the date on which that rating was received. The instructions should clarify that "NA" should be entered if the carrier has no rating.

- Second, there should be a box on the form to indicate that at least one of the purposes in filing the form is to obtain a federal safety permit. If the safety rating box (see bullet above) contains a "NA" or less the satisfactory rating, the instructions should clarify that a "x" in this box indicates that a new review is being requested.

- Third, inasmuch as the form must be notarized, there should be space provided for that function.

- Fourth, space should be provided on the form to indicate if the motor carrier is a first-time applicant for a federal safety permit or if the carrier is seeking to renew its permit.

- Fifth, in view of the permit condition requirement that a motor carrier must be in compliance with federal motor carrier safety regulations (FMCSRs) and the HMRs, we suggest that the Certification Statement be amended to more closely be aligned with standards for non-compliance found at 49 U.S.C. 1809, as follows:

  "I, _____, certify that ~~I am familiar with~~ the above named motor carrier is not knowingly or willfully in violation of the Federal Motor Carrier Safety Regulations."

Conditions For The Safety Permit

The proposed 3 year renewal cycle for the federal safety permit coincides with a recommendation of the working group developing recommendations to implement Section 22 of HMTLJSA. Likewise the Section 22 working group recommended permit form includes a "certification" that an applicant motor carrier certify compliance with all applicable federal transportation requirements.

We are concerned about the requirement that a motor carrier's federal safety permit number be displayed on shipping papers when appropriate. The obligation to prepare shipping papers falls to the "offeror" of hazardous materials for transportation, not the motor carrier. Rather than requiring the federal safety permit number to be entered on each applicable shipping paper, we recommend that provision be made to include the number on the Certification of Registration issued by RSPA pursuant to the federal hazardous materials registration program.[3] A copy of the registration certificate or another document bearing the registration number must be on board each truck and truck tractor used to transport subject hazardous materials. We believe a provision to tie together requirements for evidence of compliance with the federal safety permit and the federal hazardous materials registration program will facilitate compliance with both programs. Such a provision will also reduce paperwork. The Section 22 working group also recommended that documentation of compliance with the state-issued hazardous materials registration and permit programs be carried on board motor vehicles.

[3] 49 CFR 107.620.

In view of the certification provided at 49 CFR 397.49(c) that a motor carrier comply with the HMRs and the FMCSRs, and any applicable minimum financial responsibility laws and regulations, we do not believe there is any need for the provisions of paragraph (f). This paragraph should be deleted.

Shipper Responsibility

We realize that RSPA is scheduled to promulgate a ruling to implement Section 8(d)(3) of HMTUSA respecting the obligations of persons who offer hazardous materials for motor vehicle transportation to ensure that only motor carriers with valid federal safety permits may transport DHRHMs. We believe the shipper responsibility component is a critical to effectively enforcing this requirement. Likewise, if our recommendation to tie documentation of the federal safety permit and the federal hazardous materials registration together is accepted, compliance with the hazardous materials registration program will be aided as well. We urge FHWA to work with RSPA to move expeditiously on its proposal to implement the shipper responsibility requirement.

Definitions

The definition of "designated high risk hazardous materials" should be rephrased to eliminate extraneous parenthetical information about "new RSPA hazard classification" and "as amended" following references to 49 CFR 173.2. More helpful than a reference to 49 CFR 173.2 after each DHRHM listing would be a reference to the 49 CFR citation with the actual definition of the materials. For example, 49 CFR 173.115 and 173.132 for "extremely toxic by inhalation materials" (ETIM). This change would eliminate, at least in this instance, the need for a separate definition of ETIMs.

If there is a reason to separately define ETIMs, we believe the definition section should also contain the definition of "highway route controlled quantity" found at 49 CFR 173.403(l).

A point of some discussion among the members of the working group developing recommendations to implement Section 22 of HMTUSA was the definition of "principal place of business." Just as definitions from other sections of 49 CFR have been replicated for clarity in this subpart, we recommend that the definition of "principal place of business" currently found in 49 CFR 390.5 be repeated here as well.

Notification of Safety Rating

We believe that 49 CFR 385.11 should be amended as follows:

(c) . . .
(d) A notification of an "unsatisfactory" or "conditional" safety rating will also include a notice that the motor carrier will be subject to the provisions of section 397

subpart B which prohibit motor carriers with other than a "satisfactory" rating from transporting designated high risk hazardous materials as defined at 49 CFR 397.39.

Administrative Burden

The CWTI strongly recommends that FHWA broaden the scope of this rule to include all motor carriers subject to the federal registration requirements found at 49 CFR 107 Subpart G. In the preamble, however, the statement is made repeatedly that FHWA is proposing to initiate the federal permit program with as limited a scope as possible within the mandate of the HMTA, The justification for the limited application of the rule is that administrative burdens **map** overwhelm the system. We disagree with this assessment, especially as it applies to motor carriers transporting placarded quantities of hazardous materials. The safety rating program is already in place. In order to demonstrate compliance with 49 CFR 385.11(c), all motor carriers that have been in the business of transporting placarded quantities of hazardous materials should have a safety rating to demonstrate that their rating is above "unsatisfactory." Likewise, FHWA is already issuing to motor carriers a "notification" of their safety rating. The only "new" administrative burden would be that created by the requirement to "review" each subject motor carrier's rating every three years.

If the periodic review requirement is the extent of the FHWA's administrative burden concern, we believe that burden could be alleviated by phasing in the actual "review" of a carrier's operations. Motor carriers which have satisfactory ratings issued or revalidated within the last three years should automatically receive a "permit" until the three-year anniversary of their rating. Whatever the date on which other motor carriers receive their satisfactory safety rating -- possibly phased in over the three-year period in terms of hazard classes or amounts of hazardous materials carried -- the carrier's permit should be valid until the rating's three-year anniversary. Rather than tie permit renewal to a calendar year, the federal registration year, or the fiscal year, this approach will spread the administrative burden and allow FHWA to consider extending the benefits of the safety permit to carriers of other types of hazardous materials.

Conclusion

The CWTI supports the efforts of FHWA to include provisions for the timely processing of permits and to clearly tie the issuance of the federal safety permit to objective evaluative criteria, and, at the same time, minimize compliance burdens and costs. We believe the changes recommended will contribute to consistency and clarity in federal requirements, and thus improved compliance and enhanced safety.

We appreciate the opportunity to respond to this docket. If further elaboration on any of the points raised above is required, please contact me or Cynthia Hilton, NSWMA.

Sincerely,

Stephen C. Hansen

Stephen C. Hansen
Chairman